APPEAL NO. 92113
FILED MAY 7, 1992

On February 11, 1992 a contested case hearing was held in _____, Texas, (hearing officer) presiding as hearing officer. She determined that the respondent has given timely notice of a work related injury and was entitled to benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN., arts. 8308-1.01 *et seq*. (Vernon Supp 1992) (1989 Act). Appellant urges error in two of the hearing officer's findings of fact and in two of her conclusions of law and asks that we reverse the decision.

DECISION

Determining that the findings, conclusions and decision of the hearing officer are not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust, we affirm.

The sole issue in this case is whether the respondent gave timely notice of her injury to her employer. Succinctly, the respondent was employed by (employer) who carried workers' compensation coverage with the appellant. She testified, through an interpreter, that she was working on a tacker machine on (date of injury) when she injured herself by pulling heavy draperies and twisting her back and neck. She stated that she told her supervisor, a lady named Viola, immediately about the injury and was given a form to fill out. She testified that she filled out the form with the help of a coworker and turned it in the same day. She claims she remembers the day of her injury as being (date of injury) although she did not remember the exact date several times in the past. She acknowledged that she had answered questions propounded by the insurance company which apparently indicate a date of April 4th as the date of injury (these questions or interrogatories were never offered or accepted into evidence so we cannot be certain what they provided). The respondent stated there were other coworkers present when she told her supervisor about her injuries and recited their names. When asked on cross- examination why the claim form she filed with the commission did not list a date of injury, she replied that she did not remember the exact date at that time but remembered it later. She stated she did not have any injury prior to April 9th and that she did not suffer another injury after April 9th. She remembers the injury occurred on a Tuesday in early April.

The appellant called three witnesses: NB, a coworker; VH, the immediate supervisor of the respondent; and AK, a coowner of the business. NB testified that the respondent stated she hurt herself and that several employees were talking about it. To the best of her (NB's) recollection, this occurred sometime in March 1991 and not April and the way she recalls the time frame is that another employee injured herself in April (apparently around April 23rd) and that it was at least 30 days before that that the respondent mentioned that she had injured herself. NB also testified that the respondent asked her a question about filling out an injury report form. As she recalls, the respondent asked her the question about the injury form after the other employee's injury. NB also stated that the respondent had complained to her about back pains prior to the 9th of April and that the

respondent had mentioned seeing a "lady" in Mexico about female problems. According to NB, the respondent can understand "quite a bit of English."

VH testified that the respondent reported an injury to her but that she cannot remember the exact time this occurred. VH gave the respondent an injury report form but never got it back although she asked the respondent for it the "next day or so." The respondent told her that she was filling it out at home. VH could not remember whether or not this was in April and stated she was bad at remembering dates. However she related the respondent's injury to "way before" the other employee's injury.

AK testified that she first learned of the respondent's injury in July 1991. A supervisor called her at her home office and said that respondent needed to go to a doctor; however, AK did not know it had anything to do with her back, rather thought it was a female problem about which the respondent had seen someone in Mexico. She described the respondent as a good employee but did not think she was injured on the job.

The findings of fact and conclusions of law with which the appellant finds fault are:

FINDINGS OF FACT

3.Claimant did sustain an injury to her neck and back while within the course and scope of her employment with this Employer on (date of injury) while working on the tacker machine.

4.The Claimant did report her injury on (date of injury), to her immediate supervisor, Viola.

CONCLUSIONS OF LAW

2.The Claimant was an employee of [employer] on (date of injury) and was acting within the course and scope of her employment when she sustained a work-related injury.

3.The Claimant timely reported her work-related injury to her Employer as required pursuant to the Act.

At the outset, we observe the hearing officer's Finding of Fact No. 3 and Conclusion of Law No. 2 were superfluous since the only issue before the contested case hearing as agreed to by all parties and set out at the beginning of the hearing, was "whether the claimant reported an injury in the course and scope of employment in a timely manner." While there was probative evidence in the record of the hearing to support such a finding and conclusion, the finding and conclusion are not considered for purposes of this appeal. Texas Workers' Compensation Commission Appeal No. 91109 (Docket No. AU-A061449-01-CC-AU41) decided January 21, 1992.

To be certain, some of the testimony was uncertain and unclear in some respects and there were inconsistencies and conflicts within and between the testimony of the witnesses called. However, this was for the hearing officer to filter out and decide the facts of the case. *See* Garza v. Commercial Insurance Co. of Newark, N. J., 508 S.W.2d 701 (Tex.Civ.App.-Amarillo 1974, no writ). The hearing officer can believe all, part or none of the testimony of any one witness. Taylor v. Lewis 553 S.W.2d 153 (Tex. Civ. App.- Amarillo 1977, writ ref'd n.r.e.). While the appellant's testimony was not totally certain and was in conflict in certain respects with other evidence and testimony, the hearing officer apparently found it believable in the critical factor concerning notice being given on (date of injury). While we may well have drawn different inferences from the evidence than did the hearing officer, this is not a sound basis to reverse if there is some probative evidence to support the determinations of the hearing officer. Garza, *supra*; Texas Workers' Compensation Commission Appeal No. 92062 (Docket No. TY-91-123256-01-CC-TY41) decided April 2, 1991; Texas Workers' Compensation Commission Appeal No. 91102 (Docket No. FW-A-129124-01-CC-FW31) decided January 22, 1992.

Some of the testimony concerns significant dates in this case and the relating of such dates to other events. The passage of time may understandably fade the memory of a witness and the relating of the date of an event with some other event can appropriately be considered by the fact finder in determining when an event did occur as a matter of fact. Texas Workers' Compensation Commission Appeal No. 91097 (Docket No. TY/91-079846/01/TY41) decided January 16, 1992; Texas Workers' Compensation Commission Appeal No. 91123 (Docket No. DA-081465-02-CC-DA31) decided February 7, 1992.

Reviewing the entire record and matters submitted by the parties on this appeal, we do not find the determinations of the hearing officer were so against the great weight and preponderance of the evidence as to be manifestly erroneous or unjust. In re King's Estate, 244 S.W.2d 660 (Tex 1951). Accordingly, the decision is affirmed.

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Robert W. Potts
Appeals Judge